(SPACE BELOW FOR FILING STAMP ONLY) 1 SOLOMON E. GRESEN [SBN: 164783] STEVEN V. RHEUBAN [SBN: 48538] 2 LAW OFFICES OF RHEUBAN & GRESEN 15910 VENTURA BOULEVARD, SUITE 1610 3 ENCINO, CALIFORNIA 91436 TELEPHONE: (818) 815-2727 (818) 815-2737 FACSIMILE: 4 5 Attorneys for Plaintiffs 6 7 8 SUPERIOR COURT OF THE STATE OF CALIFORNIA 9 COUNTY OF LOS ANGELES, CENTRAL DISTRICT 10 CASE NO.: BC 414 602 11 OMAR RODRIGUEZ; CINDY GUILLEN-GOMEZ; STEVE KARAGIOSIAN; 12 ELFEGO RODRIGUEZ; AND JAMAL CHILDS. PLAINTIFF CINDY GUILLEN-GOMEZ'S 13 Plaintiffs, OPPOSITION TO DEFENDANT'S EX *PARTE* APPLICATION FOR THE 14 UNNECESSARY "PRESERVATION" OF -VS-15 THE TESTIMONY OF TIM STEHR; BURBANK POLICE DEPARTMENT: CITY Assigned to: Hon. Joanne B. O'Donnell, Judge OF BURBANK; AND DOES 1 THROUGH 16 100, INCLUSIVE. Dept. 37 17 Defendants. Complaint Filed: May 28, 2009 18 Current Trial Date: 04/25/2011 19 BURBANK POLICE DEPARTMENT; CITY OF BURBANK, 20 Cross-Complainants, 21 -VS-22 OMAR RODRIGUEZ, and Individual, 23 Cross- Defendant 24 /// 25 26 /// 27 /// /// 28

Plaintiff Cindy Guillen-Gomez's Opposition to Defendant's Ex Parte Application

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I. INTRODUCTION

This ex parte application comes hard on the heels of the Court's ruling just last week that the preservation of testimony (read: deposition) of Tim Stehr would **not** be permitted because it was not timely or appropriate. Essentially, defendant seeks reconsideration of the Court's previous ruling declining to allow the deposition. Defendant's reliance upon different statutory authority is not a proper basis to seek reconsideration under C.C.P. §1008, particularly when the previous application was untimely and denied. Defendant has had nearly 2 years to "preserve" this evidence, and their failure to do so should not be excused at this late a date.

For these reasons, and as more fully explained below, Plaintiff respectfully requests that the ex parte application be denied.

II. THE COURT SHOULD DENY THIS APPLICATION AS AN IMPROPER MOTION FOR RECONSIDERATION

A week ago, defendant brought an ex parte motion (in limine) for the identical purpose of obtaining the deposition testimony of their client, Tim Stehr. That application was denied due to defendant's clear lack of diligence in pursuing discovery during the pending two years of this case, and because the motion was untimely. Now defendant purports to come forward with an "ex parte application" for the same purpose. This is nothing more than a poorly disguised motion for reconsideration. See Morite of California v. Superior Court (1993) 19 Cal. App. 4th 485, 490.

Compliance with CCP §1008 is jurisdictional to consideration of a motion for reconsideration. The Court may not act on a motion that does not comply with its requirements. CCP §1008(e); Gilberd v. AC Transit (1995) 32 Cal.App.4th 1494, 1498-1500; see also Le Francois v. Goel (2005) 35 Cal.4th 1094, 1108. To properly move for reconsideration, the moving party "shall state by affidavit. . . what new or different facts, circumstances or law are claimed to be shown". CCP §1008(a) (emphasis added).

Issues which were, or could have been, raised in any stage of the briefing on the original motion cannot meet this standard. Berman v. Health Net (2000) 80 Cal.App.4th 1359, 1369-1370. With regard to new facts, the party seeking reconsideration must provide not only new evidence but also a satisfactory explanation for the failure to produce that evidence at an earlier time. Pazderka

v. Caballeros Dimas Alang, Inc. (1998) 62 Cal.App.4th 658, 670; Garcia v. Hejmadi (1997) 58 Cal.App.4th 674, 690; Lucas v. Santa Maria Public Airport Dist. (1995) 39 Cal.App.4th 1017, 1028. Moreover, a new or different law, must reflect a change in the law, not challenge to the trial court's interpretation of the law, Gilberd, supra, 32 Cal.App.4th at 1500, or an argument that counsel made a mistake on the law. Pazderka, supra, 62 Cal.App.4th at 670. (A mistake based on ignorance of the law or imprecision in drafting legal arguments is not a proper basis for reconsideration). The statute provides that "a violation of this section may be punished as a contempt and with sanctions as allowed by Section 128.7." CCP §1008(d).

Plaintiff respectfully submits that Defendant cannot point to a new or different fact, circumstance or law which would permit reconsideration under *CCP* §1008. As such, the Court need go no further. The application should be denied.

III. DEFENDANT DOES NOT HAVE GOOD CAUSE TO GRANT EX PARTE RELIEF

Even if the Court were to be inclined to consider the application substantively, which it should not do as a matter of law, or consider the application as one to shorten time, which was not noticed, the Application should still be denied. Rule 3.1202(c) of the *California Rules of Court* requires the moving party to make an affirmative factual showing in a declaration containing competent testimony based upon personal knowledge of the irreparable harm, immediate danger of other good cause for granting relief *ex parte*. The mere lack of time for statutory notice or desire to proceed in a speedier fashion is not a sufficient reason for proceeding *ex parte*. *Datig v. Dove Books, Inc.*, (1999) 73 Cal.App.4th 964, 977 (1999) (even where *ex parte* procedure statutorily allowed, proper showing must be made); *see also* Weil & Brown, *Cal. Prac. Guide: Civ. Proc. Before Trial* (The Rutter Group 2010) §9:364, p. 9(I)-144.

Here, the Defendant had plenty of time to "preserve" the evidence during the discovery phase of this action, but failed to do so. Tim Stehr was the Chief of Police for Defendant City of Burbank, and he is now a paid "consultant" for this and other litigation. Simply put, there is no good cause to grant this *ex parte* application in any respect.

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IV. DEFENDANT'S PRONOUNCED LACK OF DILIGENCE IN DISCOVERY SHOWS A LACK OF GOOD CAUSE TO FURTHER EXTEND DISCOVERY

The Court cannot grant the relief requested without implicitly extending the discovery cutoff, which this Court declined to do just a week ago. Even if the Court were to consider defendant's request for extension of the discovery cutoff, the request should still be denied.

Under CCP §2024.050(b), the Court "shall" take into consideration any relevant factor on a motion to extend the discovery cutoff, including: the <u>diligence or lack of diligence</u> of the party seeking the discovery, and prejudice to the opposing party including likelihood of moving the trial date, and, the <u>length of time that has elapsed</u> between any date previously set, and the date presently set, for the trial of the action. Examination of all of these factors weights strongly in favor of denying defendant's request to extend the discovery cutoff in this action.

Any further extension will prejudice the Plaintiff, as she is entitled to confront witnesses against her at trial. As such, every factor the Court is required by law to consider weights against granting defendant's *ex parte* application to further extend the discovery period to "permit discovery."

V. THE COURT SHOULD CONSIDER ISSUING AN OSC RE SANCTIONS AGAINST DEFENDANT'S COUNSEL UNDER SECTION 128.7

Defendant's ex parte application is so lacking factual and legal merit that the Court should consider issuing an order to show cause why defendant's counsel should not be sanctioned under CCP §128.7(d). Pursuant to CCP §128.7(d) any party who brings an improper motion for reconsideration is subject to sanctions under CCP §128.7. Defendant does not appear to have had a proper new or different fact, or change in the law as required.

Furthermore, the Court should consider whether it should sanction defendant's counsel for bringing this improper request to extend the discovery cutoff under *CCP* §2024.050 (c).

If this Court agrees to entertain sanctions, Plaintiff will promptly submit a declaration in support thereof.

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VI. CONCLUSION

For all of the foregoing reasons, defendant's Application should be denied.

LAW OFFICES OF RHEUBAN & GRESEN Dated: April 18, 2011

By: Solomon E. Gresen Attorneys for Plaintiffs